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Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-387

THE HERALD COMPANY, ET AL., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD,

and

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL #200, AFL-CIO

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICUS CURIAE THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
Interest of the Amicus Curiae	2
Background	3
Reasons for Granting the Writ	6
Conclusion	15

TABLE OF CASES

Carnation Company, 172 N.L.R.B. No. 215 (1968) 9
Carnation Co. v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970) 2, 6, 9, 10, 11
Carter Publications, Inc., 100 N.L.R.B. 599 (1952) 8
Frito-Lay, Inc. v. *N.L.R.B.*, 385 F.2d 180 (7th Cir. 1967) 2, 13, 14
Golden Age Dayton Corp., 124 N.L.R.B. 916 (1959) ... 11
Hearst Publications, 28 N.L.R.B. 1006 (1941) 6
Hearst Publishing Co., 102 N.L.R.B. 103 (1953) 8
Houston Chronicle Publishing Co., 140 N.L.R.B. 1267 (1963) 8
N.L.R.B. v. *A. S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964) 2, 12, 13, 14
N.L.R.B. v. *Hearst Publications*, 322 U.S. 111 (1944) .. 7
National Van Lines, Inc. v. *N.L.R.B.*, 273 F.2d 402 (7th Cir. 1960) 12
P. G. Publishing Co., 114 N.L.R.B. 60 (1955) 8
Pultizer Publishing Co., 146 N.L.R.B. 302 (1964) 8
Pure Seal Dairy Co., 135 N.L.R.B. 76 (1962) 11
San Antonio Light Division, The Hearst Corp., 167 N.L.R.B. No. 99, 66 L.R.R.M. 1131 (1967) 8
Site Oil Co. of Missouri v. *N.L.R.B.*, 319 F.2d 86 (8th Cir. 1963) 12
Squirt-Nesbitt Bottling Corp., 130 N.L.R.B. 24 (1961) 11
The Times Herald Printing Co., 94 N.L.R.B. 1785 (1951) 8
Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594 (1953) 5
United Insurance Co. of America v. *N.L.R.B.*, 304 F.2d 86 (7th Cir. 1962) 12, 13

MISCELLANEOUS: Page

Editor & Publisher, April 1, 1967 5

H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947) 8

H. R. Rep. No. 245, 80th Cong., 1st Sess. (1947) 7, 8

Lee, The Daily Newspaper in America (1937) 5

STATUTE:

29 U.S.C. § 152(3) (1964) 6

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association files this brief as Amicus Curiae, urging that this Court review the decision of the United States Court of Appeals for the Second Circuit in this case affirming

the National Labor Relations Board's determination that petitioner's franchise newspaper distributors are employees within the meaning of section 2(3) of the Labor Management Relations Act, notwithstanding they have substantial proprietary interests in their business and they depend for income upon reselling, at a profit, newspapers, the title to which has passed to them. Your amicus files this brief in accordance with Rule 42(1) of the Rules of this Court and pursuant to the consents of the parties filed herewith.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a nonprofit, membership corporation organized and existing under the laws of the State of New York. Its membership consists of 1,054 daily newspapers, whose publications represent more than ninety percent of the total daily and Sunday newspaper circulation in the United States.

The Association's membership is vitally interested in the fundamental and underlying issue presented by this appeal: namely, whether under the facts and circumstances, the franchise distributors of the Petitioner are employees within the meaning of Section 2(3) of the Labor Management Relations Act. As petitioner points out in its petition for a writ of certiorari, the decisions of the Board and court below will have serious impact on franchise businesses in the United States. Deviating from the decisions in other circuits,[1] the tribunals below effectively would convert all fran-

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[1] *N.L.R.B.* v. *A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964); *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F.2d 180 (7th Cir. 1967); and *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970).

chisees into employees for the purposes of the Labor Management Relations Act. In an attempt to dilute the effect of these decisions were the Board to limit the application of this case to only newspaper publishers, the importance of the decisions becomes even more apparent, for the newspaper publishing business would stand on a grossly unequal footing with other businesses whose franchise relationship would remain undisturbed.

In distributing to the public their respective newspapers, a substantial number of the Association's members utilize independent distributors under agreements similar, if not in many cases almost identical, to the franchise agreements used by Petitioner with its distributors. Prompt, efficient, and economical distribution of a newspaper to the reading public is one keystone of a successful newspaper business. Many newspapers, plagued with myriad other labor problems, are seriously concerned with preserving the integrity of the economic and efficient franchise distribution agreements. To this end, this Association desires to assure its members that the use of such distribution arrangements accomplishes what both the publisher and distributor intended.

Background

Daily newspapers generally utilize four means of distributing to the reading public. One is by newspaper carrier boy; another is second class mail; third, news stand sales; and a fourth is by adult, independent distributors who purchase their newspapers from the publisher, own their distribution trucks, and operate on the profit derived from the difference between the amount billed to their customer-subscribers and their

cost of doing business.[2] It is with this last category, of course, that this appeal is concerned.

Where these independent distributors are used, considerations of economy and efficiency usually have led to the establishment of exclusive distribution areas or routes. In these areas, there ordinarily is no competition among adult carriers, although copies may and usually are sold by stores, honor racks, and street corner salesmen.

The largest percentage of most daily newspaper circulation consists of home deliveries. These home subscriptions constitute the most stable circulation element; and, for this reason, newspapers devote considerable effort to increasing these subscribers. New subscribers often telephone the newspaper directly as a result of the good will the publisher has established in the community over the years. Also, most daily newspapers conduct active subscription campaigns, including prizes and premiums, travel rewards, introductory offers, visual advertising, and direct telephone solicitation. Frequently, independent distributors are

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[2] Some newspapers do not utilize independent contractors in their distribution network. Instead, they directly employ "district managers", who in turn have many distribution employees under their control. In this structure, the distribution trucks are owned by the newspaper, and truck drivers and others in this network are employed by and under the supervision and control of the publisher. Although many factors are considered in deciding to adopt the independent contractor network or district manager network, the pivotal factors are cost and service. By eliminating the financial burden of vehicles, cost and maintenance, fringe benefits, payroll taxes, and supporting administrative staff, a newspaper may save considerable money in utilizing independent contractors in distributing the newspaper. It also may find that in its peculiar local community relationships the independent contractor method is best.

given premiums or bonuses for each new subscription they acquire. Ultimately, subscribers' lists are the result of long years of cultivation and financial investment by the publisher.

The traditional device of supply and demand is of little importance in setting the circulation price of a newspaper. Newspapers are a service business the income from which is dominated by advertising revenue. The market demand for newspapers will not sustain a circulation sales price even approximating publication costs. In fact, no daily newspaper publisher approaches a break-even point through circulation revenue.

At a circulation price of ten cents per copy, and disregarding soaring labor costs, most newspapers do not even cover their costs of newsprint and ink. For example, during the time period herein, a typical daily newspaper in the 240,000 circulation range spent $4.4 million on newsprint and ink, yet derived only $2.9 million from circulation revenue.[3] This financial reality has persisted since the advent of the large, daily newspaper in this country.[4] In fact, statistics accumulated by your amicus indicate that usually less than 25% of the gross revenues of daily newspapers were derived from circulation, whereas 75% or more of the revenues were generated by advertising.[5]

The profitability of the daily newspaper business primarily depends, then, on advertising; and the foun-

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[3] Editor & Publisher, April 1, 1967, at 14.

[4] Lee, The Daily Newspaper in America 273 (1937).

[5] See also, Editor & Publisher, April 1, 1967, at 14; *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 604 (1953).

dation upon which advertising sales rest is a stable circulation, nursed through an efficient and economical distribution system fitted to the local communities' needs. As pointed out above, circulation is basically a low income factor for newspapers. Thus, newspapers are vitally concerned with preserving the independent distribution system because it has been found by many newspapers to be the most economical and efficient method of getting the daily newspaper to the ultimate reader in its local community.

REASONS FOR GRANTING THE WRIT

Throughout the administrative and judicial litigation of this case, petitioner has sought to have vindicated its position that its franchise distributors are independent contractors and not employees embraced by Section 2(3) of the Act.[6]

In the Decision and Direction of Election, the Regional Director places great emphasis on alleged economic control exerted by Petitioner over its distributors. Indeed, the case turned on that point. Such reliance on economic control constituted reversable error, for, as the Ninth Circuit in *Carnation* held, evidence regarding economic controls is not *ipso facto* relevant to Section 2(3) determination.[7]

In the original Wagner Act, Congress did not specifically define the term employee. Because of this failure, The National Labor Relations Board in *Hearst Publications,* 28 N.L.R.B. 1006 (1941), held that

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[6] 29 U.S.C. § 152(3) (1964) which provides, in pertinent part: "When used in this subchapter . . . the term 'employee' . . . shall not include . . . any individual having the status of an independent contractor. . . ."

[7] *Carnation Co.* v. *N.L.R.B.,* 429 F.2d 1130, 1134 (9th Cir. 1970).

regular, full-time newspaper boys were employees within the meaning of the Act. Subsequently, this Court affirmed this determination and rejected the contention that by using the term employee, Congress intended to import the common law standards applied by the courts to distinguish employees from independent contractors. *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111 (1944). In so doing, this Court announced that:

> "the broad language of the Act's definitions . . . leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." Id. at 129.

Applying this test, this Court held that the *economic facts* of the relation, in this case, make it more nearly one of employment than of independent business enterprise. 322 U.S. at 128.

In 1947, Congress rejected the *Hearst* decision by amending Section 2(3) to exclude an independent contractor from the term employee.[8]

Explaining the difference between an employee and an independent contractor, Congress stated in the House Report accompanying the amendment bill:

> " 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' un-

[8] In H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947) Congress stated the reason *Hearst* was rejected:

> "Congress intended . . . that the Board give words not far fetched meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, [this amendment] excludes 'independent contractors' from the definition of 'employee'." (Explanation added.)

> dertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits." H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947).[9]

Following enactment of the Taft-Hartley amendments, the Board applied the "right of control" test in distinguishing between employees and independent contractors. This test, as indicated by the House Report, essentially turns on whether the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished or whether he controls only the result. Thus, the newspaper boys, vendors, distributors, and dealers who control the manner and means by which newspapers are sold and distributed are independent contractors and the Board, until recently, has so held.[10]

Beginning with *San Antonio Light Division, The Hearst Corp.*, 167 N.L.R.B. No. 99, 66 L.R.R.M. 1131 (1967), the Board departed from its customary method of applying the "right of control" test. Rather than

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[9] Moreover, in the House Conference Report, Congress emphasized that "independent contractors . . . can in no sense be considered to be employees . . ." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947).

[10] *See, e.g., Pultizer Publishing Co.*, 146 N.L.R.B. 302 (1964) (carriers); *Houston Chronicle Publishing Co.*, 140 N.L.R.B. 1267 (1963) (news vendors); *P.G. Publishing Co.*, 114 N.L.R.B. 60 (1955) (distributors); *Hearst Publishing Co.*, 102 N.L.R.B. 103 (1953) (news vendors); *Carter Publications, Inc.*, 100 N.L.R.B. 599 (1952) (dealers); *The Times Herald Printing Co.*, 94 N.L.R.B. 1785 (1951) (dealers).

balancing the factors showing newspaper control of sales and circulation against the factors showing vendor control as Regional Director had done in initially determining that the newspapers' vendors were independent contractors, the Board placed disproportionate significance on indicia concerning the entrepreneurial status of the vendors.

The Board's relapse into pre-amendment rationalization is graphically illustrated by the Board's decision in *Carnation Company,* 172 N.L.R.B. No. 215 (1968) where the Board cited the economic control exerted by the company over its franchise distributors as its reason for holding those distributors to be employees rather than independent contractors.[11]

On appeal, however, the Ninth Circuit correctly recognized that economic control is not the kind of control that is relevant to a decision whether a person is an independent contractor or an employee. *Carnation Company* v. *N.L.R.B.,* 429 F.2d 1130 (9th Cir. 1970). The Court correctly rejected the Board's position that economic control is relevant, recognizing that such economic control is present in a variety of typical franchising arrangements where the franchisees would not be considerd employees for NLRA purposes.

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[11] In *Carnation,* the Board cited in addition to others, certain control such as the limitation imposed by the Company on the distributor's right to assign his franchise; the company requirement that distributors' proceeds be deposited in a bank account jointly owned by the Company; the Company's right to immediately terminate the agreement upon the distributor's breach; the restriction on the distributor forbidding him to sell any competitive product; and the requirement that the distributor must advertise in accordance with the Company's directions.

In *Carnation,* the Board found that Carnation's wholesale distributors were employees under the Act. These distributors were granted exclusive licenses to sell Carnation's products in a particular geographic area. All distributors purchased their trucks and equipment from Carnation on conditional sales contracts, secured by an assignment of the distributor's accounts receivable. Distributors' revenue was required to be deposited in a joint bank account with Carnation, from which funds could be withdrawn only over the joint signatures of the distributor and a Carnation official.

The distributors in *Carnation Company* were not permitted to sell any competitive product. They were required to display on their trucks any advertising supplied by Carnation and also were required to paint their vehicles in a specific manner. If the distributor breached his agreement, Carnation had the right to terminate with only one day's notice. Upon termination, the distributor was obligated to resell his accounts receivable to Carnation. Carnation also had the right to take title to any vehicle upon which a balance was owing without the duty to account for the distributor's equity.

The Court recited general principles of agency as applicable in determining the status of Carnation's distributors and dismissed the Board "economic control" arguments by stating:

> "Most of the facts which the Board now asserts to be proof of Carnation's retention of the power to control its drivers are facts (economic rights and sanctions) which can be found in a variety of 'franchise' arrangements oriented toward brand-name protection and market penetration. In such

> cases there is no attempt to supervise the details of the work, and no assertion that the franchise holder is anything but an independent business man." *Carnation Company* v. *N.L.R.B.*, 429 F. 2d 1130, at 1134.

Economic control, therefore, should not have been the foundation upon which the Regional Director issued his Direction of Election. Regarding the other suggested foundation of his Direction decision, the Regional Director erred in applying extant administrative and judicial law to the facts surrounding the petitioner's alleged control of the distributor's means of accomplishing delivery of the newspaper.

The Board in *Pure Seal Dairy Company,* 135 N.L.R.B. 76 (1962) properly recognized the right of control test to determine whether one is an employee or independent contractor. Although the Board explicitly recognizes this test in many cases, it frustrates its application to the particular facts by only giving it lip service and insisting upon placing unfounded reliance on economic control. Notwithstanding, in *Pure Seal,* the Board properly pointed out that:

> "It is well established that in determining the status of persons alleged to be independent contractors, the Act requires the application of the 'right of control' test. Where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to the result sought, the relationship is that of independent contractor."[12] *Id.* at 79.

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[12] See also *Squirt-Nesbitt Bottling Corp.,* 130 N.L.R.B. 24 (1961); *Golden Age Dayton Corp.,* 124 N.L.R.B., 916 (1959).

In the instant case, the 1965 franchise agreement under which the distributors and Petitioner operated clearly demonstrates that Petitioner did not reserve any right to control the distributors in their day-to-day operations. The formal basis of the relationship between the publisher and the distributor is this written contract. It is apparent that this contract on its face does not create an employment relationship, and although this fact is not necessarily determinative, it is of substantial import.[13] Some of the highlights of that contract are: (1) The Herald Company assigned and transferred to the distributor the right to sell newspapers in a specified geographic area; (2) the distributor purchased papers from Petitioner; (3) the distributor agreed to promote the sale of the newspapers; (4) the distributor agreed to cooperate in effectuating any promotional program adopted by Petitioner; (5) the distributor maintains the right to sell any competing newspapers within his area; (6) and the distributor shall efficiently distribute the newspapers, including inserts and supplements, at places and times designated by Petitioner.

The distributor possesses the right to sell his distributorship, subject only to Petitioner's right of first refusal. Moreover, the agreement passes by operation of law to the distributor's heirs, should he not otherwise dispose of it.

The responsibility for acquiring and maintaining any vehicles the distributors deem necessary to carry

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[13] *See, e.g., N.L.R.B.* v. *A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964); *Site Oil Co. of Missouri* v. *N.L.R.B.*, 319 F.2d 86 (8th Cir. 1963); *United Insurance Co. of America* v. *N.L.R.B.*, 304 F.2d 86 (7th Cir. 1962); *National Van Lines, Inc.* v. *N.L.R.B.*, 273 F.2d 402 (7th Cir. 1960).

out their contractual obligations rests with them. Distributors possess the right to hire assistants and they assume the responsibility for any and all payroll taxes.

Those benefits normally afforded by Petitioner to its employees such as sick benefits, vacations, pensions, and insurance, are not extended to distributors. Petitioner makes no deduction for social security or income taxes, nor does it carry workmen's compensation insurance on its distributors.

Aside from alleged economic controls discussed *supra,* there is no finding of the Regional Director supporting his conclusion that Petitioner controlled the day-to-day operation of its distributors. It did control through the distribution contract the end result, *i.e.,* times and places of newspaper delivery. It did not, however, control how that end result was to be accomplished.

In this connection, the facts and circumstances herein involved are practically identical to those of *N.L.R.B.* v. *A. S. Abell Co.,* 327 F.2d 1 (4th Cir. 1964).[14] There, the Fourth Circuit held that distributors, operating under franchise agreements almost identical to the instant case, were independent contractors exempted by Section 2(3) of the Act. As in *Abell,* the essential business decisions concerning the operation of the route are largely within the discretion of the distributors herein involved. Like most independent businessmen, he may either reap the profits or bear the losses which result from his judgment. For example, exercising this discretion, he decides whether or not

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[14] See also, *Frito-Lay, Inc.* v. *N.L.R.B.,* 385 F.2d 180 (7th Cir. 1967); *United Insurance Co. of America* v. *N.L.R.B.,* 304 F.2d 86 (7th Cir. 1962).

to extend credit to his customers. He chooses whether to employ helpers and, if he does, he must decide upon the manner and amount of their compensation. The soundness of his judgment, his economy in vehicle maintenance and operation, and his employment of helpers or substitutes determine his profit.[15]

Also, as in *Abell,* Petitioner's distributors perform the actual physical delivery of newspapers *largely* uninhibited by Petitioner. The distributors, in *Abell,* were required to deliver the newspapers in tubes in rural areas and were permitted to discontinue delivery only because of a customer's nonpayment. As here, the *Abell* carriers maintained the accurate and current list of subscribers. Yet the Court held this "supervision" to be *de minimus* and to not affect the distributors' status as independent contractors.

In *Frito-Lay, Inc.* v. *N.L.R.B.,* 385 F.2d 180 (7th Cir. 1967), the distributors operated under agreements the essence of which was identical to the *Carnation, Abell,* and instant agreements, and the Seventh Circuit correctly noted that the *de minimis* controls exercised by the Company focused on the end result and hence did not control the employee-contractor determination. Yet the Board and Court below completely ignored this distinction by holding that such minor controls affecting the end result of the franchise arrangement were evidence of an employer-employee relationship. As Petitioner concludes in its petition, a franchise rela-

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[15] The Regional Director's Decision and Direction of Election appear to place some emphasis on subsidies received by distributors. It should be noted that some carriers in *Abell* received subsidies, but the Fourth Circuit apparently considered this fact of little import, treating it instead in a summary footnote recitation. *N.L.R.B.* v. *A. S. Abell Co.,* 327 F.2d at 7.

tionship can never be properly characterized as an employment contract merely because some control is retained by the franchisor.

CONCLUSION

For the reasons stated herein and in the petition for a writ of certiorari to the Second Circuit, it is respectfully urged that the petition be granted.

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